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NO. 84-951

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

GULF COAST CABLE TELEVISION CO.,
Petitioner,

v.

AFFILIATED CAPITAL CORP.,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the *Noerr-Pennington* doctrine prevents antitrust liability for an agreement between applicants for cable franchises not to compete on franchise terms, when a municipal official actively participated to include a personal business associate in the deal.

2. Whether the *Noerr-Pennington* doctrine should immunize all communications with a municipal official, even when those communications facilitate unlawful conduct by the municipality.

II

PARTIES TO THE ACTION

Respondent is Affiliated Capital Corp. It is affiliated with the following entities:

ACRG Joint Venture
Affiliated Oak Venture
Atrium at Beltway II
Beechnut Place Apartments Phase I
Beechnut Place Apartments Phase II
Bellaire-Ashford Apartments
Braesridge Apartments
Braesridge 305 Associates
Colony Creek, Ltd.
FM149 Venture
Fairdale Building Venture
Fondren Glen Apartments
Fondren Village Apartments
Goldberg, Inc.
Greater Houston Center Development Corporation
Greater Southwest Office Park
Pinnacle/Affiliated Joint Venture
Ransom Properties
River Park, Ltd.
Rolling Creek Joint Venture
Southwest Crossing Venture
Southwest Houston Cable TV Co.
326 Limited
Two Alarm Properties

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

For the reasons set forth herein, respondent Affiliated Capital Corp. opposes Gulf Coast Cable Television Co.'s Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

Gulf Coast Cable Television Co.'s ("Gulf Coast") statement of the case contains two critical omissions. *First,* it fails to describe the factual detail of its unlawful conduct. Most of this conduct simply cannot be char-

acterized as "traditional political tactics."[1] The unlawful agreement superceded politics as well as competition. *Second,* the statement ignores the recent passage of the Local Government Antitrust Act of 1984.[2] That Act largely confines the impact of the decision below to a limited number of cases filed before its enactment, and contains legislative history supporting the outcome below.[3]

THE FACTS AND PROCEEDINGS BELOW

Respondent Affiliated Capital Corp. ("Affiliated") sought a cable television franchise in Houston in 1978. It was the only local applicant found qualified by the City which did not receive a franchise. At trial Affiliated proved that its failure to obtain a franchise resulted not from politics or competition, but from an anticompetitive agreement involving Gulf Coast to eliminate competition over the terms of cable franchises. The City participated in the anticompetitive agreement by the mayor's secret deal to ensure that a business associate of his would be included in the anticompetitive conspiracy.[4] The evi-

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1. The record contains *no evidence* of any traditional political activities by Gulf Coast and its conspirators.

2. Pub. L. No. 98-544 (1984). For a portion of the text, see note 38 *infra.*

3. See legislative history quoted at p. 17 *infra.*

4. Houston has a strong mayor form of government. The general partner of defendant Gulf Coast testified that Mayor James McConn negotiated to get his personal lawyer in on the package deal:

> [T]he mayor stated, he said, "Bill, I hate to ask you this," he said, "my lawyer, Marvin Katz, helped me during my dark days and helped me during the time that I was having problems financially, and he and a group headed by a Mr. Goldstein and a Mr. Rudy would like to apply for a small franchise area, 25,000 homes, more or less, in your client's territory."

Appellant's appendix below at 214. Gulf Coast then cut Mr. Katz's group into the deal. Appellant's appendix below at 215-17.

dence showed that Affiliated's downfall also occurred in part because of its refusal to participate in territorial market division with Gulf Coast and other applicants.

The trial court submitted the case to the jury under the rule of reason on two liability theories: one based on market division, and the other based on other anticompetitive practices with an exclusionary effect.[5] The jury received extensive instructions on the *Noerr-Pennington* privilege, the sham exception to *Noerr-Pennington,* and a "legislative process" immunity.[6]

Gulf Coast offered no evidence of *any* redeeming virtues of its anticompetitive practices. There could be none. The agreement eliminated competition between the parties to the agreement and restricted competition from non-conspirators. Similarly, despite an intimation to the contrary in the Petition for a Writ of Certiorari ("the Petition"), the City did not conceive of, nor did it require, the initial anticompetitive agreements between the potential competitors. To be sure, after the conspiracy was well underway,[7] Mayor James McConn became an active participant in the unlawful agreement by requesting that the largest applicant, Gulf Coast, make room for an additional franchise to be owned by a business associate who had helped him financially.[8] Other city officials may have

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5. Plaintiff had pursued these as separate theories, on the assumption that market division, but not the other practices, would be tested by the per se rule.

6. The court below reprinted the *Noerr-Pennington* and sham instruction, 735 F.2d at 1566-67 n.6 (petitioner's appendix at A-23-24).

7. For the timing of the mayor's entry in the conspiracy, see Reply Brief to Supplemental Brief for Rehearing En Banc by Gulf Coast Cable Television, filed below, at 2-4, and citations and record references therein.

8. See note 4 *supra.*

become participants by requesting that Affiliated seek approval of the private conspirators to obtain a franchise.[9] The jury found that Gulf Coast and others, including Mayor James McConn, participated in a conspiracy to restrain trade which proximately caused damage to Affiliated.

In motions for a directed verdict and judgment n.o.v., the district court considered and rejected Gulf Coast's argument that *Noerr-Pennington* protected its anticompetitive conduct. Affiliated responded before the district court and on appeal that (1) the challenged conduct—a private agreement to present a package deal without competition—did not constitute petitioning conduct; (2) any petitioning conduct by Gulf Coast was a sham because prior anticompetitive agreements already had determined the outcome; and (3) the mayor's unlawful participation in the private deal to obtain a place in the conspiracy for his business associate eliminated the applicability of *Noerr-Pennington* to agreements between the private conspirators and the mayor.[10] The trial court, in an extensive opinion, found it necessary to rule only on the last of these three arguments.

After considering the case law, the district court shaped a principle that protects traditional political activity without immunizing antitrust violations in which a municipal official actively participates:

> The Court interprets the decisions rendered pursuant to the authority of *Noerr, Pennington,* and *Parker* as suggesting the following result. When a restraint of trade is the result of valid governmental

9. *See, e.g.,* 735 F.2d at 1558-59 (petitioner's appendix at A-7-8).

10. *See* Brief for Appellant at 37-46; Reply Brief for Appellant at 8-12; and Reply Brief to Supplemental Brief for Rehearing En Banc by Gulf Coast Cable Television at 14-18.

> action which was induced by the joint efforts of private parties, those joint efforts are shielded by *Noerr-Pennington* immunity. When, however, the governmental action is rendered invalid by the illegal, not merely unethical, conduct of the government entity acting as a co-conspirator, the joint efforts of the private parties are not automatically entitled to immunity.

519 F. Supp. at 1024-25 (petitioner's appendix at A-123-124). The court applied this test to the facts to sustain the jury's verdict on liability.[11] Since the court denied *Noerr-Pennington* protection because of the unlawful acts of the City, it found it unnecessary to analyze the facts supporting application of the sham exception.[12] The initial Fifth Circuit opinion adopted without discussion the district court's extensive treatment of *Noerr-Pennington*.[13] Nine judges of the *en banc* panel also approved the district court's analysis, noting that the jury instruction on *Noerr-Pennington* "was favorable to the defendants."[14] Those judges not only reviewed the evidence to confirm the factual predicate for the co-conspirator exception,[15] but noted that the record contained evidence which would support a finding of sham.[16] Judge Higginbotham, concurring, noted that the Court had decided only a very narrow *Noerr-Pennington* issue:

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11. 519 F. Supp. at 1012-26 (petitioner's appendix at A-99-126).

12. *Id.* at 1013 (petitioner's appendix at A-102). At that page in note 22 the district court noted that where "the conduct of the private parties is infected or invalidated by the illegal conduct of the public officials," the labels "sham" and "co-conspirator" both may be appropriate, with like effect.

13. 700 F.2d at 237 (petitioner's appendix at A-57).

14. 735 F.2d at 1566-67 n.6 (petitioner's appendix at A-23-24).

15. *Id.* at 1567 (petitioner's appendix at A-24).

16. *Id.* at 1567-68 (petitioner's appendix at A-24-25).

> In the present posture of this case there is no petition to the government at issue. We do not face a successful request for governmental action with anticompetitive results where the participation of government was confined to that of decisionmaker.

735 F.2d at 1571 (petitioner's appendix at A-32). The three dissenters from the *en banc* opinion, who thought that the agreement to restrict competition could not violate the antitrust laws once the City decided to award multiple franchises, did not express any disagreement with the majority's treatment of *Noerr-Pennington.*[17]

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

THERE IS NO CONFLICT OR INCONSISTENCY IN THE CIRCUITS

No circuit has ever held that *Noerr-Pennington* protects conduct of private individuals designed to facilitate a clear violation of the antitrust law by a municipality.[18] No circuit has extended the *Noerr-Pennington* privilege to communications between private individuals and a co-conspirator who happened to be a public employee. No circuit has disagreed with this Court's statement that: "Conspiracy with a licensing authority to eliminate a competitor may also result in antitrust transgression." *California Motor Trucking Co. v. Trucking Unlimited,* 404 U.S. 508, 513 (1972).

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17. *Id.* at 1573-74 (petitioner's appendix at A-36-38).

18. Correspondingly, courts have recognized that governmental acquiescence cannot legalize a private conspiracy. *See, e.g., Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976).

The "conflict in the circuits" contrived by petitioner arises from a misreading of *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975), in which the alleged antitrust violation amounted to a request for a favorable vote and a $50 campaign contribution by a franchise applicant to a mayor.[19] The Seventh Circuit *did not* reject the principle of a co-conspirator exception arising from private participation in unlawful municipal conduct.[20] The Seventh Circuit simply held that no conspiracy with a municipal official could be found on the facts. The court correctly held that the mayor's support for a particular franchisee did not by itself make the mayor a conspirator.[21]

The Seventh Circuit itself limited the holding of *Metro Cable* in *Kurek v. Pleasure Driveway & Park District of Peoria, Ill.*, 577 F.2d 580 (7th Cir. 1977), *vacated and remanded*, 435 U.S. 992 (1978), *reinstated*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979).[22] After noting that *Metro Cable* did not entail a claim of governmental action violating the Sherman Act, the Seventh Court in *Kurek* concluded that subsequent case development had "undercut the validity" of the *Parker v. Brown* premises of *Metro Cable*.[23]

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19. In *Metro Cable*, plaintiff apparently complained that the defendant city chose to award only one franchise, a "monopoly." 516 F.2d at 229. Plaintiff's only evidence of a conspiracy to restrain trade was lobbying by two of the defendants and the campaign contribution. *Id.* at 230. At oral argument plaintiff acknowledged that the failure of the city council to hold a hearing was "the essence" of the case. *Id.* at 231.

20. *Id.* at 229-30.

21. *Id.* at 230.

22. *See* the district court's detailed analysis of *Metro Cable* and *Kurek*. 519 F.Supp. at 1018-19 (petitioner's appendix at A-110-112).

23. 557 F.2d at 589.

Critical references to the co-conspirator exception in cases in two other circuits are *obiter dicta* unsupported by careful analysis. At most they stand for the proposition that courts look critically at attempts by plaintiffs to avoid summary judgment on traditional *Noerr-Pennington* facts by making conclusory allegations of official participation in some loose "conspiracy." In *Federal Prescription Service v. American Pharmaceutical Association,* 663 F.2d 253 (D.C. Cir.), *cert. denied,* 455 U.S. 928 (1981), plaintiffs alleged that defendant, a trade association of pharmacists, conspired with state boards regulating pharmacies simply because pharmacists sat on those boards. The District of Columbia Circuit correctly found no conspiracy. In *First American Title Co. of South Dakota v. South Dakota Land Title Association,* 714 F.2d 1439 (8th Cir. 1983), *cert. denied,* ____U.S.____, 104 S.Ct. 709 (1984), defendants had lobbied the legislature to obtain a statute restricting the availability of title insurance. The Eighth Circuit stated that *Noerr-Pennington* protected this traditional lobbying, regardless of plaintiff's allegation that the state's Board of Examiners became a 'conspirator" by lobbying the legislature.[24]

None of the cases from other circuits cited by petitioner would have been decided differently under the carefully-crafted standard[25] articulated by the district court and adopted by the Fifth Circuit in this case.

The balancing of competing policies embodied in the Fifth Circuit's rule in this case squares well with the com-

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24. In the other Eighth Circuit case cited by petitioner, *Westborough Mall, Inc. v. City of Cape Girardeau,* 693 F.2d 733 (8th Cir. 1982), *cert. denied,* 461 U.S. 945 (1983), the court held there was no *Noerr-Penington* protection because defendants, including the City, acted fraudulently by misrepresenting the zoning classification of a tract.

25. See the standard quoted at pp. 4-5 of this brief.

mentary cited in the Petition. One commentator simply believed that the co-conspirator exception should apply only to situations in which the government officials have an interest in the success of the conspiracy and "take an active role in the defendant's activities."[26] Another commentator contended that a conspiracy should not be made of the "mere coincidence of the view of public officials and those doing the petitioning."[27] The last commentator cited by petitioner, on the scant analysis of a couple of early cases, thought the exception would prove unworkable,[28] but cases decided since that commentary have not supported that prediction.

The *en banc* opinion of the Fifth Circuit should dispel fears of inferences of conspiracy from routine legislative acts. The court articulated a rule balancing the important competing interests, a rule which should at least have an opportunity to be applied by other courts before consideration by this Court. After all, it is doubtful that any circuit will fail to apply the co-conspirator exception altogether when that failure would immunize private parties who benefit from unlawful governmental conduct, leaving the municipality alone holding the bag.[29]

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26. Kintner & Bauer, *Antitrust Exemptions for Private Requests for Governmental Action: A Critical Analysis of the* Noerr-Pennington *Doctrine,* 17 U.C.D. L. Rev. 549, 585 (1984).

27. Bern, *The* Noerr-Pennington *Immunity Petition in Light of* City of Lafayette's *Restriction on the State Action Immunity,* Ariz. St. L.J. 279, 300-01 (1980).

28. Fischel, *Antitrust Liability for Attempts to Influence Government Actions: The Basis and Limits of the* Noerr-Pennington *Doctrine,* 45 U. Chi. L. Rev. 80 (1977).

29. Obviously municipal officials cannot petition themselves, and cannot avail themselves of *Noerr-Pennington.* Also, preventing private liability for conspiracies in which public parties would be liable reverses the principle of the Local Government Antitrust Act of 1984, which clearly immunizes public but not private participation in antitrust violations.

If there remains any continuing uncertainty about the facts upon which application of the co-conspirator exception is appropriate, the Court should examine a closer case than this one to define the factual distinctions. The trial judge who heard the evidence, Judge Carl O. Bue, Jr.,

> [P]erceive[d] no injustice in depriving Gulf Coast of *Noerr-Pennington* immunity on facts which demonstrate not only that public officials actively participated in an illegal conspiracy but also that the private parties involved were aware of and sought such participation.

519 F. Supp. at 1025 (petitioner's appendix at A-125).

II.

THE DECISION BELOW IS NOT ERRONEOUS AND WILL NOT HAVE NEW, DAMAGING CONSEQUENCES

The policy-based portion of the Petition requests this Court to grant the writ on essentially three grounds: (1) antitrust laws should not reach this type of conduct; (2) the mayor and other city officials did not conspire with Gulf Coast; and (3) the decision below will open the floodgates to similar lawsuits. The first two points amount to no more than a loud, but hardly original, complaint that the antitrust laws are too broad and too vague. Recently enacted federal legislation, as well as the historical lack of success by plaintiffs in antitrust cases concerning municipal action, undercut the third point.

A.

The Finding of Illegality by the Jury and by the Courts Below Does Not Represent a Novel Extension of Antitrust Law

The briefs of appellant below showed how the activities of Gulf Coast and its co-conspirators resembled closely those activities traditionally held to violate the antitrust laws. Agreements to divide markets and to refrain from competition on the terms of service in franchise applications clearly resemble the acts of anticompetitive bid-rigging which frequently have victimized cities and prompted liability. To effectuate the purpose of this conspiracy, the conspirators restricted competition from non-conspirators by welcoming a public official into the inner workings of the conspiracy. This resulted in one of the most pernicious antitrust violations imaginable. The agreement eliminated competition not only on price but also on all other terms and conditions of service. The conspirators could act without fear of effective entry by a non-conspiring potential competitor, because a top municipal official had become part of the conspiracy in exchange for the conspirators' agreement to let the official's business associate in on the deal.

Gulf Coast's policy analysis of the "far-reaching" consequences of the decision below begins with the mistaken premise that the *en banc* panel based its decision on a preference for competitive bidding to the exclusion of politics.[30] That analysis conveniently misses the point. Antitrust, since its earliest application, has condemned rigging of bids to municipalities.[31] Of course, nothing

30. Petition at 12.

31. *See, e.g., United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir.), *aff'd*, 175 U.S. 211 (1898).

prevents a city, or any other consumer, from rejecting the results of a competitive process. Yet the occasional use of non-competitive and even arbitrary purchasing criteria by consumers, or by municipal representatives, does not eliminate the need to preserve the availability of competitive alternatives arrived at by competitive processes, which is the function of antitrust law. And when Mayor James McConn helped eliminate all competitive alternatives to promote the interests of someone who had assisted him financially, he no more immunized the private parties' conduct than does a municipal official who discloses secret information to facilitate rigging of bids by a favored group of contractors.

Certainly both panels of the Fifth Circuit examined the background, competitive consequences, and motives of the franchising process. To a casual reader of the opinions, this may smack of judicial activism. In fact, this thorough discussion of the facts served only to permit analysis of Gulf Coast's contentions concerning (1) the purpose and effect of the challenged conduct under the rule of reason, and (2) the evidence of causation. This analysis of background does not imply judicial condemnation of all its features, as the Petition frequently suggests.

Gulf Coast extracts from the abundant evidence of causation two snippets of testimony about the political "muscle" of Gulf Coast. Yet the overwhelming preponderance of evidence in this three-week trial showed that the non-competitive "package deal," rather than any politics, accounted for Affiliated's loss. This Court can search the opinions and record below in vain for more than a few lines of testimony, elicited by leading questions from the mayor's own counsel, implying that politics as such had anything to do with the acceptance of the non-

competitive package put together by Gulf Coast and its conspirators. Indeed, while the briefs below by Gulf Coast contain some suggestions of Affiliated's political activities, they cite no evidence of any political activity by Gulf Coast. This was not a case in which the political muscle of one group of applicants prevailed over the lobbying power of other applicants. Instead, the mayor of Houston lobbied the original conspirators and obtained from them an agreement to permit entry into that conspiracy by one of the mayor's business associates. The conspiracy removed the franchise decision as far from the realm of politics as from the realm of competition.

It should come as no surprise (nor is it a "far-reaching consequence") that the legality of municipal activities actually would be tested at trial once this Court broadly expanded the recognized range of municipalities' potential antitrust liability.[32] At trial the jury must make a finding of causation. If the evidence shows and the jury concludes that competitive considerations in fact would have prevailed in the absence of conspiracy, appellate courts should not refuse to enter the verdict because it may be misapprehended as a requirement of competitive decision-making. That appears to be the "mischief" bothering Gulf Coast on pp. 17-18 of its Petition.

It is true, of course, that *Boulder* and *Lafayette* tipped the balance of the interests between economic competition and local autonomy in favor of antitrust. Those decisions reflected the preeminent, almost constitutional role of antitrust,[33] as well as the significance of the risks of

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32. *See, e.g., Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982).

33. *See, e.g., United States v. Topco Associates, Inc.*, 405 U.S. 596, 612 (1972).

predation by those utilizing governmental processes.[34] This Court's decisions permit state legislatures to immunize even the most blatant anticompetitive actions by clearly articulated statutes.[35] Absent such a mandate, however, cities and city officials could be liable in antitrust for displacing competition. Private beneficiaries of this type of unlawful governmental conduct obviously may encourage it, and the courts have held that the right to petition does not automatically protect the active, joint procurement by private interests of unlawful government actions.

The first amendment right to petition has never prevented liability for efforts to procure unlawful government action, such as attempts to bribe legislators or unlawfully influence the official actions of a judge or judicial clerk. Certainly James Madison conceived the right to petition for purposes other than protection for rigging franchise applications, dividing markets, and rewarding business associates of politicians.[36] Making the petitioning privilege turn on the legality of the municipality's conduct is no more "circular," as petitioner suggests, than condi-

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34. As Professor, now Judge Bork, has noted:

> Predation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition. Antitrust law is beginning to catch up. . . .

R. Bork, *The Antitrust Paradox* 357 (Basic Books, paperback ed. 1978)

35. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52 (1982); *City of Lafayette v. Louisiana Light & Power Co.*, 435 U.S. 389, 414-15 (1978).

36. Recall that on first learning of the Bill of Rights from Mr. Madison, Thomas Jefferson complained to his friend that they should have included an express prohibition of monopolies. Monopolies such as those held by influential friends of the crown and ministry were regarded as particularly great threats to liberty in Mr. Madison's time. Their equivalents are no less so today.

tioning the legality of gifts to legislators on compliance with statutes regulating bribery and campaign contributions.

B.

The Law of Antitrust Conspiracy Should Not Be Reworked for this Case

This would be an odd case for this Court to review the evidentiary requirements necessary to satisfy the conspiracy requirement for restraints of trade. The Court's prior discussion of the issue recognizes that rules must be general enough to apply to a variety of cases and avoid creating safe harbors for the clever wrongdoer.[37] Identical policies would inform articulation of the evidentiary requirements of a co-conspirator exception. Any reasonable standard would defer to some extent to the trier of fact.

At page 14 the Petition assumes that the restraint of trade at issue in this case consists solely of the passage of a franchise ordinance, rather than the anti-competitive

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37. The leading cases defining sufficiency of evidence of antitrust conspiracy include *Monsanto Co. v. Spray-Rite Service Corp.*, ___U.S.___, 104 S.Ct. 1464 (1984); *United States v. Container Corp. of America*, 393 U.S. 333 (1969); and *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939). In contrast to the instant case, each of those cases addressed recurrent factual patterns which had been litigated extensively in lower courts. *Monsanto* clarified in general terms the test for sufficiency of evidence of conspiracy between dealers and manufacturers; the issue had fragmented the circuits, and panels within a circuit. *Container Corporation* attempted to resolve the nagging issue of when agreements to exchange prices became price-fixing conspiracies. *Interstate Circuit* made clear that a finding of conspiracy does not require evidence of direct conspiratorial communications. These cases offer well-reasoned guidance for determining the sufficiency of evidence of conspiracy.

package deal arranged by Gulf Coast. Only by this erroneous assumption can it then distinguish this agreement from traditional anticompetitive conspiracies.

A ruling by this Court in this case would have only limited application to future cases because of recently enacted legislation prospectively curtailing liability of municipalities and their officials. The Local Government Antitrust Act of 1984, passed after the ruling *en banc* in the instant case, provides broad immunity from civil antitrust actions for municipalities and their officials in cases filed after its enactment.[38] In certain circumstances it provides for relief from damages, but not from liability or injunctive relief, in pending cases against municipalities.[39] Since the reasoning of the courts below turns in large part on the conduct of the city official participating in the conspiracy, the sharp restriction of municipal liability in future cases may occasion a similar restriction in the availability of a co-conspirator exception to *Noerr-Pennington.*

Interestingly, the legislative history of the Act expressly acknowledges that the mayor's conduct in this case so far

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38. Section 2(a) of the Act provides:
Sections 4, 4A, and 4C of the Clayton Act (15 U.S.C. 15, 15a, and 15c) shall not apply to any law or other action of or official action directed by, a city, village, town, township, county, or other general function unit of local government in the exercise of its regulatory powers, including but not limited to zoning, franchising, licensing, and the establishment or provision of public services on an exclusive or nonexclusive basis in a manner designed to ensure public access or otherwise to protect the public health, safety, or welfare, but excluding the purchase or sale of goods or services on a commercial basis by the unit of local government in competition with private persons, where such law or action is valid under state law, except that this subsection shall only apply to cases filed after the date of enactment of this Act.

39. See section 2(b)(1) of the Act.

exceeded his official duties as to preclude immunity even under the broad sweep of the Act's protections. The House Judiciary Committee stated:

> The definition of official conduct allows good faith errors by the local government officials in conducting the public business. . . . On the other hand, participation in criminal acts, or other behavior clearly falling outside a local government's authority, would fall outside the definition of official conduct. *See Affiliated Capital Corp. v. City of Houston*, ____ F.2d____ (5th Cir. July 16, 1984) (en banc).

House Comm. on Judiciary, Local Government Antitrust Act of 1984, H. R. Rep. No. 965, 98th Cong., 2d Sess. 20.

The posture of this case makes it an inapt candidate for settling the law, since review of the issues presented by Gulf Coast would not determine even whether the *Noerr-Pennington* privilege should apply in this case. The court of appeals would still have to consider whether the jury verdict could be sustained by non-petitioning activity or "sham" petitioning. Judge Higginbotham has commented already on the lack of petitioning activity[40] and nine Fifth Circuit judges have suggested the sham nature of Gulf Coast's conduct.[41]

Whether petitioning amounts to a sham is an issue of fact. The trial court instructed the jury on the affirmative defense of *Noerr-Pennington*, as well as on the sham exception. Gulf Coast had the burden of proof on the availability of the *Noerr-Pennington* privilege. It did not object to the instruction that it had the burden.[42]

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40. 735 F.2d at 1571 (petitioner's appendix at A-32).

41. 735 F.2d at 1567-68 (petitioner's appendix at A-24-25).

42. *See* Reply Brief of Appellant below at note 26 for authorities and record references.

C.

The Ruling Below Will Not Open the Floodgates

Since conduct resembling that challenged here presumably is not the norm for municipal government, the floodgates argument would have been implausible even before the recent legislation. After all, this is the only case since *Lafayette* concerning municipal conduct so similar to traditional antitrust violations. It is one of only two cases involving municipal action known to respondent which has resulted in a jury finding of an antitrust violation. The Local Government Antitrust Act of 1984 will reduce the opportunities for similar facts to generate similar cases, and hence for application of the *Affiliated* test. As noted above, with the *en banc* decision before it, Congress chose not to alter the outcome or reasoning of this case. If the *en banc* decision does in the future prevent the exact conduct challenged here, that is all the more reason to let it stand.

If this Court wishes to extend *Noerr-Pennington* immunity to all communications between private parties who agree to limit competition between themselves whenever that agreement influences government action, it can do so in a similar case which has been briefed and argued already in this Court—*Southern Motor Carriers Rate Conference, Inc. v. United States*, No. 82-1922.[43]

CONCLUSION

Someday this Court may be asked to review a case that goes too far too fast in penalizing genuine petitioning

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43. Arguments made against such an expansion of *Noerr-Pennington*, arguments which apply with equal force in this case, can be found in Brief of the United States at 33-36, *Southern Motor Carriers Rate Conf., Inc. v. United States*, No. 82-1922.

that results in an unlawful act of local government. This is not the case. Gulf Coast points to no first amendment value protected by the conspirators' elimination of competition between themselves and by their ability to exclude potential competitors. Delay in the ultimate disposition here would simply raise doubts whether a venal, anticompetitive arrangement could escape the scrutiny of antitrust.

If lower courts in the future must decide with some frequency the legality of communications between private and public persons found at trial to be co-conspirators, nine judges of the Fifth Circuit *en banc* have adopted a sophisticated rule which correctly balances the relevant competing interests. Henceforth courts can test the rule's application to truly political activity on the facts of particular cases. If lower courts rarely will confront this issue—as evidenced by the case law in seven years since *City of Lafayette* and the likely consequences of the new legislation—then this Court's opinion on an issue examined by so many judges below (with no dissent on the issue urged by petitioner) becomes unnecessary.

The petition for writ of certiorari should not be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 14th day of January, 1985, three true and correct copies of the foregoing document were forwarded to counsel of record by first class mail.

WILLIAM H. WHITE